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Recommended Citation
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IN THE UTAH COURT OF APPEALS

PROVO CITY, Plaintiff / Appellee vs. WILLIAM GARCIA-SANCHEZ, Defendant / Appellant	:	Case No. 20060453-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT – PROVO, STATE OF UTAH, FROM A CONVICTION OF UNLAWFUL DETENTION, A CLASS B MISDEMEANOR, BEFORE THE HONORABLE CLAUDIA LAYCOCK

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IN THE UTAH COURT OF APPEALS

PROVO CITY,	:	
Plaintiff / Appellee	:	
vs.	:	Case No. 20060453-CA
WILLIAM GARCIA-SANCHEZ,	:	
Defendant / Appellant	:	

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	:	
Defendant / Appellant.	:	
	:	

JURISDICTION OF THE COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Whether reversal is required because no recording was made of Defendant's testimony before the jury which prohibits this court conducting a full review of the proceedings in the trial court. The ultimate issue here is constitutional in nature and therefore, should be reviewed by this Court for correctness. *See State v. Beckstead*, 2006 UT 42, ¶8 , 140 P.3d 1288.

CONTROLLING STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the Addenda of the Petitioner's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

William Garcia-Sanchez appeals from the judgment, sentence and commitment of the Honorable Claudia Laycock, Fourth District Court , after he was convicted by a jury of unlawful detention, a class B misdemeanor.

B. Trial Court Proceedings and Disposition

Garcia-Sanchez was charged by Information filed in Fourth District Court on September 16, 2004 with unlawful detention, a class B misdemeanor, in violation of Utah Code Annotated § 76-5-304. Originally the charge included a domestic violence enhancement but that was stricken at arraignment (R. 7-8). An amended Information which reflects this change was filed on March 24, 2005 (R. 26).

A petition for inquiry into competency was filed on March 23, 2005 (R. 24-25). On March 25, 2005 the trial court ordered that Garcia-Sanchez be evaluated concerning his competency (R. 27-31). The evaluations found him to be competent.

On January 25, 2006 a jury trial was held with Judge Laycock presiding (R. 133-34, 154). After a deliberation, Garcia-Sanchez was found guilty by the jury (R. 130).

On March 6, 2006 Garcia-Sanchez was placed on court probation for 12 months, sentenced to twenty days in the Utah County Jail, ordered to pay a fine (R. 138-39).

On March 13, 2006 trial counsel filed a motion to extend the time to appeal to allow the appointment of appellate counsel for Garcia-Sanchez (R. 141-44). On March 16, 2006 Judge Laycock granted that motion and extended the time to appeal to April 17, 2006 (R. 146-48).

On April 14, 2006 a notice of appeal was filed in Fourth District Court (R. 150).

STATEMENT OF RELEVANT FACTS

A. Testimony of Johana Marie Evans

Johana Evans is a student at BYU. She is married and resides in Utah County (R. 154: 67). On the afternoon of August 23, 2004 she and her husband, Matt, were shopping for a car at Brent Brown Automotive in Provo (R. 154: 68). She left Matt there because she needed to get to work at Convergys in Orem by 4:00 p.m. She couldn't miss because it was a new job and she was in training (R. 154: 69-70).

She returned to their apartment located at 680 North 500 West in Provo (Parkside Apartments) (R. 154: 70-71). She normally would park her car in the parking garage and then would take a set of stairs up to the third level. From the stairwell you can see 500 West and the sidewalk (R. 154: 71). On the day in

question she parked her car in the garage and retrieved her training books from the apartment (R. 154: 72).

As she was returning to the stairwell she noticed a Hispanic male wearing a blue bandana and a comfortable, loose tan shirt below her on the street (R. 154: 72, 104). The bandana obscured her vision of his forehead, the top of his ears, and his hair "a little" (R. 154: 103-04). She could see his face (R. 154: 104). At trial she couldn't describe her assailant's jaw line, lips, nose or ears or how dark or light his brown eyes were (R. 154: 106-07). She testified that she didn't know how verbally to describe physical traits (R. 154: 114).

His appearance made her "uneasy" (R. 154: 72). She proceeded down the stairs and was on approximately the second level when she noticed that the man had come up the stairs (R. 154: 73). She was shocked, surprised and scared (R. 154: 74). She was surprised because nobody other than residents of the complex use those stairs (R. 154: 94). There are, however, a few visitor parking spaces in the garage (R. 154: 95).

As they passed each other, the man grabbed her left arm tightly around the elbow and wouldn't let go (R. 154: 74). She attempted to struggle to pull away but couldn't (Id.). She was held like this for approximately a minute while the man was grinning (R. 154: 75). Finally, after about 30 seconds, she was able to get away (R. 154: 75). She identified the man as the defendant in open court (R. 154: 76, 102).

After she freed herself she hurried down the stairs while he continued up the stairs (R. 154: 76). She went down to the parking garage, which is underneath the apartments but, as she approached her car, she was grabbed a second time by the same man (R. 154: 77, 97). He firmly took hold of her from behind by the right arm with his other arm around her hip below her purse (R. 154: 78, 79).

He didn't attempt to take her purse (R. 154: 78). He didn't attempt to assault her (R. 154: 96).

To free herself she turned and kicked him with the heel of her foot connecting with his kneecap or higher on his leg (R. 154: 79, 103). Again she identified the defendant for the jury as the man in question (R. 154: 79). At the time of the attack she was able to observe him for a couple of minutes (R. 154: 80).

After she freed herself with the kick, she opened the car with the keyless entry, quickly got in, shut and locked the doors (R. 154: 80). At this point she "froze" just sat in the car for a few seconds (Id.). The man started banging on the driver's side window forcefully with his fist for a few seconds and then she backed out and drove away (R. 154: 81, 82).

The entire encounter with the man lasted approximately 2-3 minutes (R. 154: 98-100).

She proceeded down 500 West and then to work in north Orem (R. 154: 82). While stopped at the light on 800 North she could see the man walking towards her and the hospital through the rearview mirror (R. 154: 82, 83).

Once she arrived at work she called her husband, who is a police officer (R. 154: 83). He called the Provo Police Department and her supervisors at work gave her two hours off to handle the situation (R. 154: 83). She then spoke with a Provo officer by telephone from her work before picking up her husband from the apartment and proceeding to the Provo Police station whee she met with Detective Weidinger (R. 154: 84-86). The next day she returned to the station and a composite sketch was prepared based on her description of the man (R. 154: 86).

Approximately a month later she returned to the station to look at a photo lineup (R. 154: 86, 88). She was shown photos and instructed to pick out the person she thought was her attacker (R. 154: 88). She was told they had been given leads on a couple of people (R. 154: 108). After approximately two minutes, she picked out number three because of his eyes and was informed by Weidinger that she'd picked out their suspect (R. 154: 89-90, 109). Nobody said anything to her as she looked at the photos (R. 154: 109). From the photos she could not tell true eye color, weight, hair color or skin complexion (R. 154: 110-11).

She also identified the defendant in the courtroom a few weeks before trial at a time when the courtroom was filled with people (R. 154: 90).

The man never spoke to her, didn't say anything to her (R. 154: 84). Nobody else was present on the stairwell or in the garage at the time of the attack (R. 154: 113).

B. Testimony of Matthew Evans

Matthew Evans is Johana's husband (R. 154: 131-32). On August 23, 2004 they were looking at vehicles at Brent Brown Automotive when it came time for Johana to go to work (R. 154: 132). She left him at the dealership (R. 154: 132).

Later, while still at the dealership, he received a call from Johana indicating that someone had grabbed her at the apartment, followed her down to the parking garage and that she kicked him, got in the car and left while the man banged on the window (R. 154: 133-34). She was frantic, panicked and upset (R. 154: 133). He asked if she'd called the police and she indicated that he was the first person she'd called (R. 154: 133).

He called the police and then called her and said they'd like her to come to the station for an interview (R. 154: 133-34). One of the employees at the dealership took him home, spoke with the police and Officer Hubbard responded to the apartment (R. 154: 135). They called Johana at work and Hubbard spoke to her by telephone (R. 154: 135). Eventually they went down to the police station and Johana spoke with Detective Weidinger (R. 154: 136). The next day a composite sketch was done (R. 154: 137).

C. Testimony of Drew Hubbard

Drew Hubbard is a police officer with Provo City (R. 154: 139). On August 23, 2004 he was dispatched to 680 North 500 West on a complaint of an assault against a female (R. 154: 140). He met with Matt Evans, assessed the situation and they contacted Johana by telephone at work (R. 154: 141). She told him about the assault and described her assailant as "an Hispanic male, darker

complected in his 20s to 30s, I believe she said around five-foot-seven to five-foot-11." He was wearing a blue bandana and a beige shirt (R. 154: 142-43).

He also had another officer on patrol search the area looking for the assailant (R. 154: 143). But no one matching the description was located (R. 154; 143).

D. Testimony of Don Weidinger

Don Weidinger is a supervisor with the Uniform Patrol Division, Provo City Police (R. 154: 149). On August 23, 2004 he spoke with Johana Evans at the police station (R. 154: 152). Johana described the attack to him (R. 154: 152-53). She described her attacker as an "Hispanic male, very skinny, about five-foot-six, just a few inches taller than her, wearing a blue bandana, with a tan or beige long-sleeved shirt, and he was "kind of scruffy looking"—dirty with frayed clothing (R. 154: 153, 166).

An appointment was made for Johana to meet with Karen Mean, the sketch artist, the following day (R. 154: 153). After the sketch was completed he made a copy for his report so that it could be disseminated to various news agencies and others (R. 154: 155). He also gave a copy to Johana so that her apartment manager could distribute it (R. 154: 155).

Subsequently he received various calls which did not pan out except for one (R. 154: 156). He received a cal from an anonymous male saying that William Garcia was the man he was looking for and he gave an address of 247 North 500 West, within six blocks of the Evans' apartment (R. 154: 156-57).

He attempted to make contact with the suspect and found the name of William Garcia on one of the mailboxes (R. 154: 157). He left a business card and a request to be contacted in the appropriate doorway (R. 154: 157).

He received a call from William and then met with him at his home (R. 154: 158). He testified that William became defensive when informed of why the officer was there but he allowed Weidinger into the residence to look around (R. 154: 159). Weidinger did not find either a blue bandana or a beige shirt during a cursory search (R. 154; 159). During their conversation, Weidinger testified that William was fixated on the issue of race (R. 154: 160). He spoke in English with William (R. 154: 167).

Afterwards, Weidinger contacted the Drivers License Division and requested a copy of a photo of William (R. 154: 160). Once he received it he put together a photo lineup made with photos copied onto white paper (R. 154: 161). He then contacted Johana and she came in and looked at the lineup (R. 154: 162). She picked out the photo of William Garcia-Sanchez (R. 154: 163). When asked if he recognized the person he'd spoken to earlier at the residence, he testified, "I believe it's the defendant. He's somewhat fleshier from what I recall" (R. 154: 164).

E. Testimony of William Garcia-Sanchez

The minute entry from trial indicates that the defendant testified (R. 133-34). However, the trial transcript only reads: Tape turned off at 2:49:10 to

3:20:56. Minutes indicate defendant testified but it was not recorded (R. 154: 174).

SUMMARY OF THE ARGUMENT

The Fifth and Fourteenth Amendments to the Constitution, which protect individuals from any governmental deprivation of life, liberty, or property with the due process of law, applies to the appellate process. Because Utah has passed legislation regarding the recording of criminal proceedings, it is bound to apply that legislation in accordance with the requirements of due process.

While a complete, verbatim record of all court proceedings may not be compulsory, decisions from the United States Supreme Court as well as this Court imply that it must be a record of sufficient completeness to permit proper consideration of the appellant's claims. Where, as here, a record of Defendant's testimony before the jury does not exist because the court's audio equipment was not on, fundamental fairness demands that a defendant not be required to pursue his appeal while hobbled by an incomplete record. There were no eyewitnesses to the alleged crime in this case nor was there any physical evidence. This case was all about credibility and the identification of the victim versus the testimony of the defendant.

Due process is a flexible concept based on the concept of fairness, and "should afford the 'procedural protections that the given situation demands.'" *Low v. City of Monticello*, 2004 UT 90, ¶15, 103 P.3d 130, 134 (Utah 2004)

(citations omitted). Without Defendant's testimony, trial error cannot be adequately reviewed. Accordingly, fundamental fairness and due process demands that he be granted a new trial.

ARGUMENT

Due Process Requires That Garcia-Sanchez Be Granted A New Trial Where The Recorded Transcript Does Not Include His Testimony Before the Jury and without It He has been Deprived Of His Constitutional Right To Meaningful Appellate Review

Notions of fundamental fairness are protected by the Fifth and Fourteenth Amendments, which "prohibit[] any state deprivation of life, liberty, or property without due process of law." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). The United States Supreme Court has applied this guarantee under a two-step analysis, addressing first "whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property," and second "what procedures constitute 'due process of law.'" *Id.*

Here, the individual interest concerned is that most basic American concept, liberty – specifically, the deprivation thereof consequent to a criminal conviction. Thus, the question before this Court requires a determination of those procedures due a criminal defendant in pursuing an appellate review of his conviction when part of the trial transcript is missing.

The United States Supreme Court has determined that the guarantee of due process extends to the appellate process. *See Evitts v. Lucey*, 469 U.S. 387, 392, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985) (Where "a State has created appellate courts as 'an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," ... the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution," *quoting Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956)).

The district courts of Utah are courts of record. Utah Const., art. VIII, §1; Utah Code Ann. §§ 78-1-1(1),(2), 78-1-2 (1987). As such, a record of all its official proceedings are to be made. Utah Code Ann. § 78-56-105 (1997) (*see* Addenda). Judges "are required to make a record of the proceedings they conduct. Ordinarily, the record consists of a verbatim transcription or recording *of the entire proceeding*." *Liska v. Liska*, 902 P.2d 644, 649 (Utah App. 1995) (emphasis added). Having established a statutory requirement for the recording of court proceedings, Utah courts should be bound to apply that requirement fairly and uniformly. While a verbatim record may not be required, it should be "a 'record of sufficient completeness' to permit proper consideration of'" the appellant's claims.'" *Mayer v. City of Chicago*, 404 U.S. 189, 193, 92 S.Ct. 410, 414, 30 L.Ed.2d 372 (1971), *quoting Draper v. Washington*, 372 U.S. 487, 496, 83 S.Ct. 774, 779, 9 L.Ed.2d 899 (1963). "Generally, a record is adequate *if it permits appellate review*." *Liska, supra*, 902 P.2d at 649 fn. 6 (emphasis added).

While the focus of the Supreme Court's decisions cited above addressed providing transcripts to indigent appellants, the language used is at least instructive. In *Griffin*, for example, a decision on the merits of the appeal was necessarily dependent upon a *sufficient transcript* of the trial court proceedings. *See* 351 U.S. at 13-14, 76 S.Ct. at 588.

Utah cases that have approached the issue presented by the instant case include *State v. Tunzi*, 2000 UT 38, 998 P.2d 816 (Utah 2000) and *State v. Taylor*, 664 P.2d 439 (Utah 1983). In the former, the videotape of the second day of the defendant's trial could not be located and was therefore not transcribed for the record. *Tunzi,* 998 P.2d at ¶2, 817. This Court ordered a new trial, observing that "attempts to reconstruct major portions of records often prove to be futile because such reconstructions often fail to provide the detail necessary to resolve the issues on appeal. The burdens and futility associated with reconstructing a record are increased exponentially when the issue on appeal concerns the sufficiency of the evidence supporting a conviction, as it does here." *Id.* at ¶3.

Similarly, in *Taylor*, this Court ordered a new trial in a case challenging the adequacy of the trial court's jury voir dire because the audiotaped questioning had a number of inaudible responses. *Taylor*, 664 P.2d at 445-447. In so ordering, this Court noted that it could not assume what the jurors' answers showed when they were "totally absent from the record and c[ould] not be reconstructed by agreement of the parties." *Id.* at 447.

While neither *Tunzi* nor *Taylor* addressed the due process implications of an incomplete or inadequate record, this Court nevertheless implied that a meaningful appeal could not be accomplished absent a record that sufficiently memorialized the issue presented.

This Court has also found plain error when a trial court fails to enter statutorily mandated written findings, reasoning that "only when such steps are taken can this Court properly perform its appellate review function." *State v. Labrum*, 925 P.2d 937, 940 (Utah 1996), *quoting State v. Nelson*, 725 P.2d 1353, 1356 n. 3 (Utah 1986); *see also State v. Eldredge*, 773 P.2d 29, 35 (Utah), *cert. denied*, 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d (1989); *State v. Matsamas*, 808 P.2d 1048, 1051 (Utah 1991). Again, implicit in this line of cases is the assumption that a meaningful appeal can only be accomplished with enough of a record to review the appellant's claims.

Utah's Court of Appeals has explicitly held that the government's "improper recording and maintenance of the ... record is a due process violation in that it deprived [appellants] of their right to a meaningful review." *West Valley City v. Roberts*, 1999 UT App. 358, ¶7, 993 P.2d 252, 255 (Utah App. 1999) (audiotape malfunction at housing code hearing necessitated a new hearing, despite presence of documentary evidence). In another case, an equipment malfunction resulted in a failure to record almost two hours of the appellant's criminal trial. *State v. Russell*, 917 P.2d 557, 558 (Utah App. 1996). Though the

Court of Appeals affirmed the conviction with the observation that *Taylor* "does not require a complete record so appellate counsel can go fishing for error; it only requires that there be a record adequate to review specific claims of error already raised," *Russell*, 917 P.2d at 559, the court found the case to be "troubling":

> It seems unfair that the great majority of convicted defendants have the luxury of searching the record for error, while an unfortunate few who encounter equipment snafus or lost reporter's notes must rely only upon the memories and notes of those present to reconstruct what happened and what errors might have been made. Additionally, this rule may tend to promote disingenuousness on the part of appellate counsel. Case law suggests if there are numerous alleged mistakes, a new trial must be held unless the entire record can be satisfactorily reconstructed.

Id. at 559, n. 1.

Other states have considered and determined that a sufficiently complete record is necessary to a meaningful appellate review. *See, e.g., People of the State of Colorado v. Killpack*, 793 P.2d 642, 643 (Colo.App. 1990) ("When testimony this crucial [addressing defendant's mental state] is in dispute and the precise language used is critical, reconstruction is not an appropriate remedy for the missing transcript. ...While we agree that loss of a portion of the complete trial

record does not automatically require reversal, nonetheless, when a defendant can show that the incomplete record "visits a hardship upon [the appellant] and prejudices his appeal" reversal is proper," internal citation omitted); *People of the State of New York v. Hussari*, 17 A.D.3d 483, 794 N.Y.S.2d 64 (NY 2005) ("When 'a record cannot be reconstructed because of the lapse of time, the unavailability of the participants in the proceeding or some similar circumstance, there must be a reversal,'" internal citations omitted); *State of Lousiana v. Ambeau*, 930 So.2d 54, 59 (La.App. 4 Cir. 2006)("Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal require reversal"); *State of North Carolina v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836 (N.C. 1984) (because "meaningful appellate review of the serious questions presented by defendant's appeal is completely precluded by the entirely inaccurate and inadequate transcription of the trial proceedings and that no adequate record can be formulated," judgment is vacated and new trial ordered); *State of Washington v. Thomas*, 70 Wn.App. 296, 298, 852 P.2d 1130 (1993); *United States v. Brown-Austin*, 34 M.J. 578, 582 (ACMR 1992) (while a "verbatim transcript is not constitutionally required for appellate review, ... [t]he government has the burden of rebutting the presumption of prejudice which results when there is substantial omission from the record").

In this case the Defense's entire case—which consisted of the testimony of William Garcia-Sanchez, the defendant—is missing from the record. There was

no recording made of his testimony. And there is nothing for appellate counsel or this court to review concerning the defense's theory of the case or his claim of innocence and misidentification.

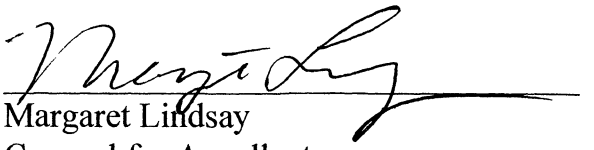
There were no eyewitnesses to the attack and there is no physical evidence. The entire case concerns the subsequent identification of William by Johana. It is her credibility against his, the substance of her testimony against his testimony. Only his testimony is missing from the record on appeal—his entire presentation of his defense is missing and cannot be reviewed either by counsel or this court.

Because his claims —his case—cannot be adequately reviewed without a transcript of his testimony, fundamental fairness and due process demands that he be granted a new trial. This is particularly true where his constitutional rights to defend himself are likewise implicated. Accordingly, because this Court cannot conclude that the absence of Defendant's critical testimony from the record is harmless beyond a reasonable doubt to meaningful and necessary appellate review, this Court should reverse Gardner's conviction. *Harrington v. California,* 395 U.S. 250, 254, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969); *Schneble v. Florida,* 405 U.S. 427, 430, 92 S.Ct. 1056, 1058, 31 L.Ed.2d 340 (1972); *see also Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Hartford*, 737 P.2d 200, 204 (Utah 1987).

CONCLUSION AND PRECISE RELIEF SOUGHT

Because Gardner was deprived meaningful appellate review due to the absence of that testimony most critical to Gardner's entrapment defense, due process requires that this Court reverse his conviction and remand this matter to the Third District Court for a new trial.

RESPECTFULLY SUBMITTED this 26th day of January, 2007.



Margaret Lindsay
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CERTIFICATE OF MAILING

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to Rick Romney, Provo City Attorney's Office, P.O. Box 1849, Provo UT 84603 this 26th day of January, 2007.